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No. 80-2143

In the Supreme Court of the United States

OCTOBER TERM, 1980

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

LAWRENCE G. WALLACE
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

CHARLES A. MOORE
General Counsel

JEROME NELSON
Solicitor

BARBARA J. WELLER
Assistant Solicitor
Federal Energy Regulatory Commission
Washington, D.C. 20426

QUESTION PRESENTED

Whether the court of appeals properly concluded that substantial evidence supported the determination of the Federal Energy Regulatory Commission, in a proceeding under Section 4(e) of the Natural Gas Act to review increased rates proposed by a pipeline company, that the pipeline failed to justify an increase in its rate of return on equity to 17% and that a 14% rate of return would be just and reasonable.

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OPINIONS BELOW

The opinion of the court of appeals (FERC Pet. App. 1a-27a),[1] as amended (FERC Pet. App. 32a-33a), is reported at 642 F. 2d 1335. The relevant orders of the Commission (Cross-Pet. App. 1a-2a, 3a) and the opinion of the administrative law judge (Cross-Pet. App. 4a-19a) are not reported.

JURISDICTION

The judgment of the court of appeals (FERC Pet. App. 28a-31a) was entered on September 24, 1980. Petitions for rehearing were denied on December 18, 1980 (FERC Pet. App. 32a-33a, 34a, 35a). The Chief Justice extended the

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[1] "FERC Pet. App." refers to the appendix to the Commission's petition for a writ of certiorari in No. 80-1937.

time for filing a petition for a writ of certiorari to and including May 17, 1981, and the Commission's petition was filed on May 18, 1981 (a Monday).[2] Transco's cross-petition was filed on June 17, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

STATUTE INVOLVED

Sections 4 and 5(a) of the Natural Gas Act, 15 U.S.C. 717c and 717d(a), are set forth at FERC Pet. App. 63a-65a.

STATEMENT

Transcontinental Gas Pipe Line Corporation ("Transco"), an interstate natural gas pipeline company, sells natural gas for resale subject to the jurisdiction of the Federal Energy Regulatory Commission under the Natural Gas Act, 15 U.S.C. 717 *et seq.* In 1976 Transco filed a general rate increase with the Commission under Section 4 of the Natural Gas Act, 15 U.S.C. 717c. Transco's request for increased rates included a proposal to increase its rate of return on equity capital from 14.75% to 17%. Pursuant to its authority under Section 4(e) of the Act, 15 U.S.C. 717c(e), the Commission suspended the increased rates for five months and ordered a hearing on the justness and reasonableness of the new rates. Most of the issues relating to the increased rate filing were resolved in a settlement approved by the Commission. However, two questions were reserved for separate hearings: (1) the justness and reasonableness of Transco's proposed increase in its rate of return on equity; and (2) the proper method of allocating transmission costs among the customers on Transco's system.

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[2]Separate petitions for a writ of certiorari were also filed on May 18, 1981, by the North Carolina Utilities Commission (No. 80-1938) and the North Carolina Natural Gas Corporation, *et al.* (No. 80-1939).

As to the first question, the Commission rejected Transco's request to increase its rate of return to 17%, finding that a 14% rate of return was just and reasonable. As to the second question, the Commission rejected Transco's method of cost allocation and ordered Transco to change its method of allocating transmission costs. The court of appeals affirmed the Commission's rate of return decision and reversed the Commission's cost allocation decision. The Commission's petition for a writ of certiorari in No. 80-1937 seeks review of the cost allocation portion of the decision below. Transco's cross- petition seeks review of the rate of return portion of the court of appeals' decision.

In his decision on the rate of return issue, the administrative law judge determined that a 14% return on equity for Transco was within a "zone of reasonableness" (Cross-Pet. App. 15a). In reaching this determination, the judge reviewed the evidence submitted by Transco (*id.* at 11a-13a), which, as noted above, proposed to increase its return on equity from 14.75% to 17%, and the evidence submitted by the Commission's staff (*id.* at 14a), which recommended that Transco be allowed a 14% return on equity. Both presentations relied on traditional comparable earnings and risks analyses.

The administrative law judge concluded that Transco's evidence failed to justify its requested rate of return (Cross-Pet. App. 13a). In particular, he noted that although "Transco poses greater risks to investors than does virtually any other pipeline company, * * * these risks are not of such magnitude as to warrant significant departure from comparable ventures having somewhat fewer risks. Transco's ability not only to survive but to achieve modest prosperity in the face of its severe gas supply situation attests to its inherent strength in the marketplace" (*id.* at 14a-15a). Based on the record evidence, the judge found that the appropriate zone of reasonableness was one that

extended from 13.5%—the point at which confidence in Transco's fiscal integrity would be assured and below which Transco's return would be less than that for investments in other enterprises having corresponding risks—to 14.3%, above which the return to Transco would be excessive at the expense of the ratepayers (*id.* at 15a). He determined that a return of 14%, which was slightly above the midpoint of the zone of reasonableness, was "amply supported" by the analysis of the Commission's staff (*ibid.*).

The Commission affirmed and adopted the administrative law judge's rate of return decision (Cross-Pet. App. 1a-2a). In affirming the Commission's order concerning the rate of return issue (FERC Pet. App. 21a-26a), the court of appeals held that substantial evidence supported the Commission's decision permitting Transco a 14% rate of return on equity and that the Commission's decision was based on "settled methodology" (*id.* at 26a).

ARGUMENT

The principal question presented in the Commission's petition in No. 80-1937, seeking review of the court of appeals' cost allocation decision, is whether a natural gas company's statutory burden of justifying an increased rate, under Section 4(e) of the Natural Gas Act, 15 U.S.C. 717c(e), applies only to the "changed" portions of the new rate, with the Commission bearing the burden, under Section 5(a) of the Act, 15 U.S.C. 717d(a), of showing that "unchanged" elements of the new rate are unjust and unreasonable before the Commission may order changes in those elements. As explained in our petition for certiorari, we believe the court of appeals erred in concluding that the Commission must comply with the requirements of Section 5(a) before it may order changes in *any* component of a

filing for increased rates. Transco's cross-petition seeks to present, in the event the Commission's petition is granted, the further question whether the court of appeals properly concluded, in its decision on the rate of return issue, that the Commission satisfied the requirements of Sections 4(e) and 5(a) of the Act in permitting Transco to collect a rate of return on equity of 14%. We adhere to the position that the requirements of Section 5(a) do not apply in the context of a Commission proceeding to review any aspect of an increased rate filing. But even if we are incorrect in our construction of the statute, there is no occasion for the Court to grant Transco's cross-petition for certiorari because, as the decision below demonstrates, Transco would, in any event, not be entitled to relief under the court of appeals' interpretation of the Act.

1. It is well settled that so long as a rate adopted by the Commission is "within a 'zone of reasonableness,' " the "courts are without authority to set [it] aside." *Permian Basin Area Rate Cases*, 390 U.S. 747, 797 (1968). See *FERC* v. *Pennzoil Producing Co.*, 439 U.S. 508, 517 (1979). That "zone of reasonableness" test was clearly satisfied in this case.

The rate of return issue arises from Transco's filing of increased rates with the Commission pursuant to Section 4 of the Natural Gas Act. As a part of that filing, Transco proposed to increase its rate of return on equity to 17%.[3] Section 4(e) of the Act, 15 U.S.C. 717c(e), provides that at any hearing involving a rate sought to be increased, "the burden of proof to show that the increased rate * * * is just and reasonable shall be upon the natural-gas company." Following a hearing, the administrative law judge found that Transco failed to carry that burden and, based on

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[3]Transco's pre-existing rate of return on equity had been 14.75%, in accordance with settlements reached in its three prior rates cases.

expert testimony, selected 14% as the most reasonable rate within a zone of reasonableness extending from 13.5% to 14.3%. The judge expressly found that any return above 14.3% "would be excessive at the expense of the ratepayers" (Cross-Pet. App. 15a). In affirming the Commission, the court of appeals concluded (FERC Pet. App. 24a-25a n.27) that:

> [T]he Commission complied with the requirements of sections 4(e) and 5(a) of the Natural Gas Act in making its rate-of-return determination. Reading sections 4(e) and 5(a) together, we conclude that the Commission is not obliged to bear the burden of proving a change resulting from higher rates unjust. It need only conclude that petitioner has failed to carry its burden of proof. Against a background of obvious conflict in credible testimony, the conclusion that Transco failed to carry its burden is inherent in the Commission's determination that any rate higher than 14.3% falls outside the zone of reasonableness.
>
> However, when the Commission not only voids a proposed rate increase, but institutes a rate of its own under section 5(a) rather than continuing the old rate in effect, it must adduce substantial evidence to prove (1) that the old rate is unjust and unreasonable and (2) the Commission's proposed rate is just and reasonable. The Commission's conclusion that only rates between 13.5% and 14.3% are just and reasonable and the substantial evidence that supports it fulfill the requirements of section 5(a) on both necessary findings.

Thus, contrary to Transco's contention (Cross-Pet. 9-11), the Commission did find that any rate above 14.3%, the upper limit of the zone of reasonableness, was unjust and unreasonable. That finding, of course, encompassed Transco's pre-existing rate of 14.75%, which had been incorporated in prior rate settlements, as well as Transco's proposed increase to 17%.

2. Transco argues (Cross-Pet. 11-12) that the decision below is inconsistent with *Columbia Gas Transmission Corp.* v. *FERC*, 628 F. 2d 578 (D.C. Cir. 1979), which held that the Commission must explain any departure from a long standing practice. Transco contends that its previous rate of return of 14.75% must be considered the point of departure against which any new rate must be measured. But questions of intra-circuit conflicts are for the courts of appeals, not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). Cf. *Davis* v. *United States*, 417 U.S. 333, 340 (1974).

In any event, the court below correctly explained that the principles articulated in *Columbia Gas* have no application to Transco's rate of return contentions (FERC Pet. App. 24a-26a). Focusing upon the differing burdens faced by the administrative decisionmaker, the court noted (*id.* at 25a) that "[i]n *Columbia Gas*, the Commission was choosing between present practice and a discrete alternative" whereas "[h]ere the ALJ faced an infinitude of choices from a low of 13.5% to a high of 17% without any distinct point of departure." Even though in the past "[t]he Commission approved settlements of 14.75% rate as just and reasonable, [it] did not indicate that neighboring figures might not also be just and reasonable, or even more just and reasonable" (*ibid.*). As the court of appeals concluded (*id.* at 26a), "making the Commission explain why it did not choose every other plausible result when it is faced with a multitude of possible outcomes and with precedents whose relevance is a matter of judgment and which do not suggest any one settled practice is both unreasonable and unlikely to advance the cause of reasoned decisionmaking."

3. Finally, Transco contends (Cross-Pet. 13) that the court of appeals erred in failing "to require the Commission to demonstrate the same caliber of reasoned decisionmaking on the rate of return issue as it required on the zone

differential issue." At bottom, Transco challenges the findings of the court below that substantial evidence supports the Commission's rate of return decision and that there is insufficient evidence to sustain Transco's position. The court of appeals determined (FERC Pet. App. 22a-23a n.24) that "substantial evidence supports the portions of the ALJ's decision that justify a 14% return. The staff witness's estimate was adopted, and the Transco witness's estimate was not, because the ALJ and the Commission concluded in an exercise of their expert judgment that the staff witness's estimate of the risks facing Transco compared to those facing other gas pipelines was superior to the estimate made by Transco's witness."

In *Permian Basin Area Rate Cases, supra*, 390 U.S. at 791-792, this Court set forth the responsibilities of a reviewing court in considering the Commission's rate orders:

> First, it must determine whether the Commission's order, viewed in light of the relevant facts and of the Commission's broad regulatory duties, abused or exceeded its authority. Second, the court must examine the manner in which the Commission has employed the methods of regulation which it has itself selected, and must decide whether each of the order's essential elements is supported by substantial evidence. Third, the court must determine whether the order may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable.

The court of appeals properly performed these responsibilities. It upheld the Commission's rate of return decision after finding that the Commission had properly exercised its statutory authority (FERC Pet. App. 24a n.27). And it found that the Commission's decision was supported by

substantial evidence and was based on a settled ratemaking methodology (*id.* at 26a). The court of appeals' substantial evidence determination does not warrant further review. See *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 310 (1974); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

CONCLUSION

The cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General

CHARLES A. MOORE
General Counsel

JEROME NELSON
Solicitor

BARBARA J. WELLER
Assistant Solicitor
Federal Energy Regulatory Commission

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